Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of:	)	
	)	
Connect America Fund	)	WC Docket No. 10-90
	)	
Developing a Unified Intercarrier Compensation Regime	)	CC Docket No. 01-92
	)	

COMMENTS OF O1 COMMUNICATIONS, INC. AND PEERLESS NETWORK, INC.

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I. INTRODUCTION

O1 Communications, Inc. ("O1") and Peerless Network, Inc. ("Peerless") (collectively "Joint CLECs") respectfully file comments in response to the Federal Communications Commission's ("FCC" or "Commission") May 18, 2018 Public Notice requesting comments on CenturyLink's Petition for Declaratory Ruling filed on May 11, 2018.[1] In its *Petition*, CenturyLink urges the Commission "to resolve the ongoing uncertainty with respect to the applicability of access reciprocal compensation charges on traffic to or from an over-the-top VoIP end user by making clear that such charges apply when the LEC or its VoIP partner provides the unique functions of an end office switch, which are the functions of originating calls and monitoring calls for termination, and initiating call set-up and take down."[2] The Joint CLECs support *CenturyLink's Petition* and respectfully ask the Commission to resolve this important issue expeditiously.

II. DISCUSSION

A. The Joint CLECs agree with CenturyLink that controversies continue over VoIP Access Reciprocal Compensation and expeditious Commission action is necessary to ensure uniformity.

As explained in *CenturyLink's Petition*, the D.C. Circuit Court's decision in *AT&T Corp. v. Federal Communications Commission*, 841 F. 3d 1047 (D.C. Cir. 2016), vacating and remanding the Commission's *2015 Declaratory Ruling*[3], which clarified that over-the-top VoIP services were the functional equivalent of end office switched access services, has resulted in disputes between local exchange carriers ("LECs") and interexchange carriers ("IXCs"),

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[1] Public Notice, "Pleading Cycle Established for CenturyLink Petition for Declaratory Ruling," DA 18-517 (May 18, 2018).

[2] Petition of CenturyLink for a Declaratory Ruling, *In the Matter of Connect America Fund*, WC Docket No. 10-90, CC Docket No. 01-92 ("May 11, 2018") (*"CenturyLink Petition").*

[3] *Connect America Fund; Developing a Unified Intercarrier Compensation Regime*, Declaratory Ruling, 30 FCC Rcd 1587 (2015) ("*2015 Declaratory Ruling*").

primarily AT&T and Verizon, over the appropriate compensation for over-the-top VoIP traffic. LECs that partner with VoIP providers to serve end users through over-the-top VoIP technology, like CenturyLink and the Joint CLECs, argue, consistent with the Commission's *Transformation Order*, the VoIP Symmetry Rule, 47 C.F.R. §51.913 and the Commission's decision in the *2015 Declaratory Ruling,* that end office switching charges are appropriate where the LEC provides end office switching functions. Despite the Commission's previous rejection of their position, AT&T and Verizon continue to argue that only tandem switching charges are due. AT&T and Verizon's refusal to pay the proper switched access compensation for the functions provided on over-the-top VoIP traffic is contrary to the Commission's *Transformation Order*[4] and the rules promulgated pursuant to that Order.

The dispute is currently subject to litigation between each of the Joint CLECs separately and AT&T and Verizon.[5] O1's case against AT&T is pending in federal district court in California and its case against Verizon is pending before the California Public Utilities Commission. Peerless' case against AT&T is pending in the federal district court in New York and its case against Verizon is before the federal court in the Northern District of Illinois. As mentioned in the *CenturyLink Petition,* Peerless' case against Verizon, like a similar case filed by Teliax, Inc. against AT&T, was recently resolved in part on summary judgment and the issue of

[4] *Connect America Fund; Developing a Uniform Intercarrier Compensation Regime,* 26 FCC Rcd 17663 (Nov. 2011) ("*Transformation Order*").
[5] *O1 Communications, Inc. v. AT&T Corp*., No. 3:16-cv-01452-VC (N.D. Cal.) filed Mar. 2016; *O1 Communications, Inc. v. MCI Communications Services*, *Inc.* C.17-12-014, Cal. Pub. Util. Commission, filed Dec. 14, 2017; *Peerless Network, Inc. v. MCI Communications Services, Inc.,* Case No. 14-cv-7417 (N.D. Ill.) filed Sept. 23, 2014; *Peerless Network, Inc. v. AT&T Corp.,* Case No. 15-cv-870 (S.D. NY) filed Feb. 5, 2015.

the appropriate compensation for over-the-top VoIP traffic was referred to the Commission for resolution.[6]

O1's case against AT&T was also resolved in part on summary judgment. Rather than refer the issue to the Commission for resolution like the courts in *Peerless* and *Teliax*; however, the court held, as a matter of law, that "current FCC policy" holds that over-the-top VoIP services "are not end office services."[7] The court in the Peerless case against Verizon expressly disagreed with this conclusion.[8] Trial in O1's case is scheduled in January 2019 to resolve the remaining issues, which may include whether O1 owes a refund to AT&T for payments made before the *2015 Declaratory Ruling* was vacated. Clarification from the Commission expeditiously on this issue is imperative to avoid inconsistent decisions on a state by state basis as well as inconsistent compensation to LECs for their provision of the same service.

A Commission declaration rejecting AT&T and Verizon's categorical refusal to compensate LECs and their VoIP partners properly for end office switched access services will also further encourage investment in IP infrastructure by giving the industry assurances that the functions and rate elements that they provide in IP will be compensated.

B. The Commission intended the VoIP Symmetry Rule to apply to all VoIP traffic, including over-the-top VoIP traffic.

The VoIP Symmetry Rule, adopted in 2011 as part of the *Transformation Order*, permits LECs to bill and collect switched access charges for functions performed not only by the LEC itself, but also for functions performed by their VoIP service provider partners when together

[6] *CenturyLink Petition* at 3-4; *Peerless Network v. MCI Communications,* slip op. at 28-29 (N.D. Ill. Mar. 16, 2018); *Teliax, Inc. v. AT&T*, 1:15-cv-01472-RBJ, slip op. at 2 (D. Colo. Sept. 1, 2017).
[7] *O1 Communications, Inc. v. AT&T Corp.,* slip op. at 1 (N.D.Ca. Dec. 19, 2017).
[8] *Peerless Network v. MCI,* slip op. at note 31.

they provide VoIP service to end users.[9] In its *Petition*, CenturyLink explains in detail how the Commission "articulated several key principles" in its adoption of the VoIP Symmetry Rule: (1) ensure structural symmetry; (2) establish new rules prospectively to minimize disputes; (3) ensure technological neutrality based on functionality; and (4) prevent double billing.[10] Consistent with these principles, nearly four years later, in the *2015 Declaratory Ruling*, the FCC rejected AT&T and Verizon's arguments that the VoIP Symmetry Rule does not apply to over-the-top VoIP services. Rather, the FCC clarified that call control functions, including call set up, supervision, and management provided jointly by a LEC and its VoIP partner, even in the provision of over-the-top VoIP services, are the functional equivalent of the incumbent LEC's end office switching in the time-division multiplexing ("TDM") network, for which it assesses end office local switching charges pursuant to 47 C.F.R. § 69.106.[11]

This view was consistent with the *Transformation Order* itself. In the *Transformation Order*, the FCC noted:

> Although the USF/ICC Transformation [rulemaking notice] proposed focusing specifically on interconnect VoIP services, we note that the Commission's existing definition of interconnected VoIP would exclude traffic associated with some VoIP services that are originated or terminated on the PSTN, such as "one-way" services that allow end-users either to place calls to, or receive calls from, the PSTN, but not both. Although these one-way services do not meet the definition of interconnected VoIP, carriers are likely to be providing origination or termination functions with respect to this traffic comparable to that of "two-way" traffic that meets the existing definition of interconnected VoIP. Moreover, intercarrier compensation disputes have encompassed all forms of what we define as VoIP-PSTN traffic, and addressing this traffic more comprehensively helps guard against new forms of arbitrage … Based on the foregoing considerations, we are persuaded to adopt that approach.[12]

The Commission continued,

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[9] 47 C.F.R. § 51.913.
[10] *CenturyLink Petition* at 5-8; *Transformation Order* at paras. 937, 939, 942, 945, 969-970.
[11] *2015 Declaratory Ruling* at ¶ 28.
[12] *Transformation Order* at ¶ 941.

> Because our prospective VoIP-PSTN intercarrier compensation rules typically involve traffic exchanged between carriers, and *because intercarrier compensation disputes have tended to involve all forms of VoIP traffic*, *we are not persuaded that the Commission should draw additional distinctions among traffic associated with different types of VoIP services, as some commenters recommend.*[13]

The Commission has also found that calls routed through the public internet are a form of interconnected VoIP service.[14]

Under this approach, the "[d]efault charges for toll VoIP-PSTN will be equal to interstate access rates applicable to non-VoIP traffic, both in terms of the rate level and rate structure."[15] The Commission stated that a LEC partnered with a VoIP provider may "charge the relevant intercarrier compensation for functions performed by it and/or by its retail VoIP partner, regardless of whether the functions performed or the technology used correspond precisely to those used under a traditional architecture."[16]

The D.C. Circuit order in *AT&T Corp. v. FCC*, vacated and remanded the *2015 Declaratory Ruling;* however, it did not find that the Commission was incorrect in its clarification that end office switched access charges apply to the over-the-top VoIP scenario. Rather, the DC Circuit concluded that, based "on the record before [the Court]," the FCC did not adequately explain why the functions provided in an over the top VoIP scenario were always the functional equivalent of end office switching functions as opposed to tandem switching

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[13] *Id.* at ¶ 954, note 1942 (emphasis added).
[14] *Extension Of The Commission's Rules Regarding Outage Reporting To Interconnected Voice Over Internet Protocol Services Providers And Broadband Internet Service Providers,* PS Docket No. 11, FCC 12-22, Final Rule 77 FR 25088 (rel. April 27, 2012) at ¶ 73.
[15] *Transformation Order* at ¶ 940.
[16] *Id.* at ¶ 970.

functions[17]. Accordingly, the law remains that functional equivalence controls what charge is appropriate.

C. The Joint CLECs agree with CenturyLink that over-top-VoIP switched access services are the functional equivalent of end office switched access services.

The Joint CLECs agree with CenturyLink's view that "a granular analysis of the functions performed by the end office local switch … shows that the Commission was fundamentally correct, and did not err, in focusing on the unique functions performed by the local switch with respect to call set-up and termination. These functions are different from the functions performed by a remote terminal, a tandem switch, or the SS7 network."[18] Generally, tandem charges are incurred for connecting and routing telephone traffic between end office switches.[19] End office charges are incurred for the functions of processing and exchanging calls to subscribers.[20]

The Commission has identified eight basic switching functions that became synonymous with end office switching in the traditional TDM technology: (1) attending – monitors for off-hook signals; (2) control – determines call destination and assigns the call to an available line or trunk; (3) busy testing – determines whether the called line/trunk is busy; (4) information receiving – receives control and busy test results; (5) information transmitting – transmits control and busy test results to tell the alerting and interconnection functions whether to complete the call; (6) interconnection – connects subscriber line to subscriber line or subscriber line to trunk; (7) alerting – rings the called subscriber's line or other signaling means if the call is destined for

[17] *AT&T v. FCC* at 1054-1056.
[18] *CenturyLink Petition* at Section III, pp. 8-17.
[19] *AT&T Corp. v. Beehive Tel. Co.,* No. 2:08 cv 941 (D. Utah Jan. 26, 2010) at 6.
[20] *Newton's Telecom Dictionary,* p. 464 (27th Ed. 2013).

another exchange; (8) supervising – monitors for call termination so the line can be released.[21] Each of these functions is performed by the LEC and/or its VoIP provider partner in an over-the-top VoIP call.

As explained in detail in *CenturyLink's Petition,* the end office switch differs from a remote terminal, a tandem switch or the SS7 network in its role in call set-up and take-down: "Put simply, the end office switch is the network element that initiates the initial treatment of a call, which is then passed on to a tandem or the SS7 network, as applicable, and holds ultimate responsibility for any sessions originating to or from the end user."[22]

LECs, like Peerless, have previously described for the FCC (as well as courts reviewing disputes over IXC "self-help" non-payment of end office switched access charges) that LEC switches (and in some cases combined with functions provided by VoIP partners) perform call set-up, supervision, and management – *i.e.*, the "end office" functions necessary to originate and terminate calls *and*, importantly, the call control functions of exactly the type found by the FCC to be "functionally equivalent" to those provided by TDM-based providers. For example, Peerless submitted an *ex parte* to the FCC in 2014[23] which explained in detail how Peerless's switching fabric (combined with functions provided by its VoIP partner) performs each of the eight basic switching functions that define end office switching with traditional TDM technology. The following excerpt from Peerless' *ex parte*[24] demonstrates this point:

> The IP switched access services provided by Peerless and its VoIP partner to AT&T and Verizon include the following basic switching functions: 1) Peerless

[21] *Classification Of Remote Central Office Equipment, Letter, Responsible Accounting Officer,* DA 92-1091, 7 FCC Rcd 5205 (Comm.Carr.Bur. 1992) ("*RAO Letter 21*").
[22] *CenturyLink Petition* at 9-17.
[23] Ex Parte of Peerless Network, Inc., WC Docket No. 10-90, GN Docket No. 09-51, WC Docket No. 05-337, CC Docket No. 01-92, CC Docket No. 96-45; December 10, 2014. This Ex Parte has been attached to these comments as Attachment 1.
[24] Attachment 1, pp. 10-12.

monitors for a Session Initiation Protocol ("SIP") invite or the Integrated Services Digital Network Initial Address Message ("ISDN IAM") from the end-user indicating they have initiated a voice call; 2) Peerless' voice switch analyzes call party number and chooses a termination party based upon its routing tables. The switch port or trunk location is communicated back to the customer equipment for interconnection; 3) Peerless' voice switch communicates to terminate the current busy status of the called party line or trunk; 4) Peerless' voice switch receives and interprets communications from the terminating carrier to determine the current busy status of the called party line or trunk; 5) Peerless' switch transmits busy and other status information back to the originating caller; 6) Peerless' switch establishes a call path from the ingress line to the egress line and maintains this path for the duration of the call; 7) Peerless' switch sends a switch message to the call to the called party's network that is translated by the terminating carrier as an indication to ring the terminating party's telephone; and 8) Peerless' switch monitors the in-progress phone call from messages indicating that the terminating party has ended the call. The table below identifies each of the local switching functions associated with end office switching performed by Peerless and its VoIP partner before AT&T and Verizon receive traffic at their POP:

Basic Switching Functions	Peerless Provides	Description
Attending –monitors for off hook signals	Yes	Peerless monitors for a SIP invite or ISDN IAM from the end-user/customer indicating they have initiated a voice call.
Control – determines call destination and assigns calls to an available line or trunk	Yes	Peerless voice switch analyzes called party number and chooses a termination path (line/trunk) based upon its routing tables. The port or TCIC is communicated back to the customer CPE for interconnection.
Busy Testing – determines whether the called line or trunk is busy	Yes	Peerless voice switch communicates to the PSTN via ISUP/SIP to determine the current busy status of the called party line or trunk.
Information Receiving – receives control and busy test results	Yes	Peerless voice switch receives and interprets communications from the terminating carrier via ISUP/SIP to determine the current busy status of the called party line or trunk.
Information Transmitting – transmits control and busy test results to tell the alerting & interconnection functions whether to complete the call	Yes	Peerless switch transmits busy/other status information back to the originating caller via SIP 480/486 or equivalent ISUP message.

Interconnection – connects subscriber line to subscriber line or trunk	Yes	Peerless switch fabric establishes a call path from the ingress line/trunk to the egress line/trunk and maintains this path for the duration of the call.
Attending –monitors for off hook signals	Yes	Peerless monitors for a SIP invite or ISDN IAM from the end-user/customer indicating they have initiated a voice call.
Control – determines call destination and assigns calls to an available line or trunk	Yes	Peerless voice switch analyzes called party number and chooses a termination path (line/trunk) based upon its routing tables. The port or TCIC is communicated back to the customer CPE for interconnection.

Notably, whether the LEC owns or operates the last mile physical facilities connecting to the end user VoIP subscriber has no bearing on whether end office functionality is provided or whether end office switched access charges may be assessed. End office switching functions and Carrier Common Line ("CCL") (which previously compensated TDM-based carriers for the use of an actual customer line facility) are two separate and distinct switched access services, and there is no basis whatsoever for IXCs to require the LEC to provide one of these types of access services in order to provide (and charge for) the other type of access service. The FCC has an established history of requiring switched access compensation for IP traffic according to the function (i.e., the rate element) performed as part of the switched access services.[25] Thus, IXCs must pay LECs end office switched access charges when those functions are performed, irrespective of whether the physical last mile facility is also provided by the LEC.

[25] *See* Attachment1, pp. 3-6.

D. The *YMax Order* did not establish that over-the-top VoIP services were not the functional equivalent of end office switching

The *CenturyLink Petition* also asks the Commission to clarify that the Commission's decision in *AT&T Corp. v. YMax Communications Corp*.[26] did not hold that over-the-top VoIP services were not the functional equivalent of end office switching.[27] The California federal district court in *O1 v. AT&T* mistakenly interpreted *YMax* to hold that the physical last mile loop, which is owned by a third party internet service provider in the over-the-top VoIP scenario, is a fundamental feature of end office switched access services.[28] This clarification is necessary to prevent further misinterpretation of *YMax* as Commission precedent holding that over-the-top VoIP services generally are not the functional equivalent of end office switched access services from an intercarrier compensation perspective.

In *AT&T v. FCC*, the D.C. Circuit Court recognized that *YMax* did not determine the appropriate compensation for over-the-top VoIP traffic: "[t]he pure holding of *YMax I* was narrow: that an over-the-top VoIP provider could not levy end-office switching charges based on a tariff that described end-office switching purely in [time-division multiplexing, traditional non-internet] TDM terms."[29]. The language of YMax' tariff and its network architecture are not typical for LECs and the VoIP service providers that partner to provide over-the-top VoIP services. The Commission explained in its decision in *YMax* that YMax did not operate its own network or perform the switched access functions necessary to complete calls to its customers and used a plug-in device known as a "magicJack." In addition, the record in that matter demonstrated that AT&T provided all of the equipment, facilities, configurations and interconnections to YMax and AT&T, not YMax, handed off the calls to other providers for

[26] *Memorandum Opinion and Order,* 26 FCC Rcd. 5742 (2011) ("YMax")
[27] *CenturyLink Petition* at 1-2
[28] *O1 v. AT&T,* slip op. at 1-2.
[29] *AT&T v. FCC,* at 1055.

completion.[30] As described elsewhere in these comments, this is not a typical over-the-top VoIP call scenario.

In fact, the FCC itself warned against using the *YMax* decision as precedent for appropriate charges for VoIP services: "[W]e also note that we need not, and do not, address issues regarding the intercarrier compensation obligations, if any, associated with VoIP over Internet Protocol ("VoIP") traffic in this Order. The Commission has never addressed whether interconnected VoIP is subject to intercarrier compensation rules and, if so, the applicable rate for such traffic, and is 'seek[ing] comment on the appropriate intercarrier compensation framework for [VoIP traffic] in a pending proceeding."[31]. Indeed, in the *Transformation Order* itself, when the Commission adopted the VoIP Symmetry Rule, it distinguished *YMax*, which was based on "the specific configuration of *YMax*'s network architecture."[32]

Nor did the Commission decide in its *Clarification Order*[33] whether any specific function is required for a LEC and VoIP partner to charge switched access compensation or whether an IXC could deny compensation for switched access services actually performed. Rather the Commission merely confirms what it had previously held, which is that a CLEC may not charge an IXC for functions that it does not perform.[34] Indeed, the Commission could not make this holding any clearer: "YMax seeks guidance from the Commission as to whether the rule language … permits a competitive LEC to tariff and charge the full benchmark rate that *neither it nor its VoIP retail partner are actually providing* … The Commission made clear in adopting the VoIP symmetry rule that it intended to prevent double billing and charges for functions not actually provided."[35]

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[30] *AT&T Corp. v. YMax* at ¶ 7.
[31] *AT&T Corp. v. YMax* at note 7 (citation omitted)
[32] *Transformation Order* at ¶970, note 2028.
[33] *Connect America Fund,* 27 FCC Rcd 2142, (Feb. 2012*)("Clarification Order").*
[34] *Clarification Order* at ¶4.
[35] *Id.* (emphasis added).

The Joint CLECs join in CenturyLink's request that the Commission confirm that it did not determine the appropriate intercarrier compensation for over-the-top VoIP services in its decision in *AT&T v. YMax.*

E. If the Commission were ultimately to determine that over-the-top VoIP services are not the functional equivalent of end office switching, such a ruling should only apply prospectively

If the Commission were to reverse its precedent and now determine, as a result of *CenturyLink's Petition,* that over-the-top VoIP services were not the functional equivalent of end office switching, such a ruling should only apply prospectively in order to avoid wreaking havoc on the industry and to prevent manifest injustice.

1. Significant changes in law should not apply retroactively when retroactive application would be inequitable or unjust.

A significant change in law should not be applied retroactively, especially when retroactive application would be inequitable and unjust.[36] In *Verizon v. FCC*, the D.C. Circuit Court held, "when there is a 'substitution of new law for old law that was reasonably clear,' the new rule may justifiably be given prospective only effect in order to 'protect the settled expectations of those who had relied on the preexisting rule.'" Moreover, the lawfulness of a party's conduct should be judged by the law that existed at the time of the conduct. [37]

The Commission should consider the equities when deciding whether a particular decision should be applied retroactively.[38] Although agency adjudications, like judicial

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[36] S*ee Verizon v. FCC,* 269 F.3d 1098, 1109 (2001) (citing *Williams Natural Gas Co. v. FERC,* 3 F.3d 1544, 1554 (D.C. Cir. 1993); see also, *AT&T v. FCC*, 978 F.2d 727, 732 (D.C. Cir. 1992) (a change in law should not be applied retroactively)

[37] *Id.* at 732.

[38] *SEC v. Chenery Corp.*, 332 U.S. 194, 203 (1947) ("the ill effects of retroactivity 'must be balanced against the mischief of producing a result which is contrary to … legal and equitable principles.'")

adjudications, may be retroactive, "judicial hackles" are raised when the decision "alters an established rule defining permissible conduct which has been generally recognized and relied on throughout the industry…"[39]. If the decision is a "'substitution of new law for old law that was reasonably clear,' a decision to deny retroactive effect is uncontroversial."[40] Moreover, if the decision is merely "new applications of existing law, clarifications, and additions" there is a presumption of retroactivity; however, that presumption can be rebuffed if retroactivity would lead to "manifest injustice."[41] Manifest injustice exists when reliance is "reasonably based on settled law contrary to the rule established in the adjudication."[42]

As demonstrated above, the Commission has recognized that even before the *2015 Declaratory Ruling,* the law supported the billing of end office switching charges by LECs partnering to provide over-the-top VoIP services. Prior to the *Declaratory Ruling*, AT&T argued against retroactivity to the Commission, which argument it rejected. The Commission held that its interpretation of the VoIP Symmetry Rule (that carriers, are permitted to collect end office switched access services for over the top VoIP services) did not depart from "settled law," nor did it substitute "new law for old law that was reasonably clear."[43] The Commission also rejected AT&T's argument that manifest injustice would occur if the VoIP Symmetry Rule as clarified by the *2015 Declaratory Ruling* applied retroactively.[44] In essence, apart from the merits of its ultimate holding in the *Declaratory Ruling* that end office charges apply to over the top VoIP services, the Commission confirmed that the *Transformation Order* in 2011[45] had

[39] *AT&T v. FCC*, 454 F.3d 329, 332 (D.C. Cir. 2006)
[40] *Verizon. v FCC*, 269 F.3d at 1109
[41] *Id.*; *Qwest Services Corp. v. FCC*, 509 F.3d 531 (D.C. Cir. 2007).
[42] *Qwest*, 509 F.3d at 540.
[43] *2015 Declaratory Ruling*, ¶¶41-43.
[44] *Id.* at ¶¶ 44-49.
[45] *Transformation Order* at ¶¶968-971.

already held that access services provided by local exchange carriers partnering with over the top VoIP providers to deliver voice traffic are the functional equivalent of end office services.[46] Indeed, even AT&T interpreted the *VoIP Symmetry Rule* as it was proposed prior to adoption in the *Transformation Order* to apply to over the top VoIP scenarios.[47] The D.C. Circuit in *AT&T v. FCC* also expressly did not address the Commission's holding that the *2015 Declaratory Ruling* be applied retroactively: "[o]n the view we take of the first claim, we need not reach this issue here."[48]

Accordingly, if the Commission were to now decide that end office switching charges are not appropriate for over-the-top VoIP services, it would not only change the law as interpreted in the *2015 Declaratory Ruling*, but also drastically change the law as it existed prior to that time (indeed, reach the opposite conclusion from what had been the law up until that point). Such a ruling would represent a significant departure from the law as it was established in the *Transformation Order* in 2011 and reiterated in the *Declaratory Ruling* in 2015.

2. Manifest injustice would result if the Commission were to apply retroactively any potential decision that over-the-top VoIP services are not the functional equivalent of end office switching.

Courts generally consider the following factors in determining whether manifest injustice would result from retroactive application of an adjudication: (1) whether the case is one of first impression; (2) whether the new law represents an abrupt departure from well-established practice or merely attempts to fill a void in an unsettled area of law; (3) the extent to which the

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[46] *Declaratory Ruling,* at ¶¶41-49.

[47] AT&T's October 21, 2011 ex parte submission to the FCC. And, the FCC expressly rejected AT&T's argument in its ex parte that "permitting the LEC partners of a retail VoIP provider to charge the same intercarrier compensation as other LECs would be broadly imposing access charges on the Internet." *Transformation Order* at ¶ 970, note 2025.

[48] *AT&T v. FCC,* 841 F.3d at 1049.

party against whom the new law is applied relied on the former law; (4) the degree of the burden which a retroactive order imposes on a party; and (5) the statutory interest in applying a new law despite the reliance of a party on the old law.[49] Consideration of each of these factors weighs heavily against retroactive application of a new ruling by the Commission that holds that over-the-top VoIP services are not the functional equivalent of end office switching.

The Commission has never ruled that tandem switching charges as opposed to end office switching charges apply to over-the-top VoIP traffic. As noted above, in the *Transformation Order,* the Commission specifically noted that it was determining for the first time what intercarrier compensation charges were appropriate for VoIP traffic.[50] In addition, the *Transformation Order,* and especially, the *Declaratory Ruling* clearly held that end office switching charges applied to over the top VoIP services. So, if the Commission were now to hold that tandem switching charges apply in this scenario, it would be a case of first impression. Such a holding would result in an abrupt departure from law as it existed since late 2011.

LECs that partner with VoIP providers to provide over-the-top VoIP services justifiably relied on law as it existed prior to any potential change by this Commission as a result of the *CenturyLink Petition.* The *2015 Declaratory Ruling* had been the law for more than two years before the D.C. Circuit vacated and remanded the ruling. The Commission also had explained in detail that its *Declaratory Ruling* was consistent with the law up until that point (which determination was not vacated by the D.C. Circuit). Enforcing tariffed charges for end office services up until at least the time any change of law is issued by the Commission is therefore

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[49] *Acosta-Olivarria v. Lynch*, 799 F.3d 1271, 1275 (9th Cir. 2015) (holding agency decision did not apply retroactively); *see also*, *Retail, Wholesale & Department Store Union v. NLRB*, 466 F.2d 380, 390 (D.C.Cir. 1972).

[50] *Transformation Order* at ¶970 (explaining the unique circumstances that justified adopting the VoIP Symmetry Rule allowing local exchange carriers to charge for functions performed by it or its VoIP partner which provides the retail VoIP services to the consumer.)

especially appropriate and fair. Conversely, it would be manifestly unjust to condemn or retroactively punish LECs for charging end office rates by ordering any retroactive refunds or credits to IXCs for those charges where the controlling law was consistent with the tariffed charges.

It would create utter havoc in the telecommunications industry if tariffs filed and charges imposed and paid years ago in compliance with the law that existed at the time the services were provided and the charges were issued were suddenly be made subject to retroactive refund liability if the law is reversed. Large IXCs like AT&T and Verizon could seize upon this opportunity, exposing LECs to massive, costly, company-threatening litigation, by filing retroactive complaints. Retroactive application of any potential change of law on this issue and requiring refunds to be paid to IXCs that paid their bills consistent with the then-existing law would be extremely burdensome and inequitable to LECs that partner with VoIP providers to serve consumers by using over-the-top VoIP technology.

Finally, there is no statutory interest in applying any change of the law on this issue retroactively. As the Commission noted in the *Transformation Order*, "[o]ne of the goals of our reform is to promote investment in and deployment of IP networks….during the transition we do not want to disadvantage providers that already have made these investments. Consequently, we allow providers that have undertaken or choose to undertake such deployment the same opportunity, during the transition, to collect intercarrier carrier compensation under our prospective VoIP-PSTN intercarrier compensation regime as those providers that have not yet undertaken that network conversion." The Commission found that this goal justified a "symmetrical approach to VoIP-PSTN intercarrier compensation [to be] warranted for all

LECs."[51] Accordingly, applying any change of law retroactively to LEC charges and requiring LECs to compensate IXCs for charges imposed when the *Transformation Order* and the *Declaratory Ruling* were in place would, in fact, conflict with the statutory interest. A LEC's IP based network and its partnerships with VoIP service providers to provide retail VoIP services furthers the goal to encourage the transition away from providing retail services over TDM (time division multiplexing, non-internet) architecture. Requiring LECs to issue refunds when refunds would not have been required if it provided its services via TDM technology would have the opposite effect than that sought by the Commission.

To prevent this manifest injustice and avoid utter havoc to the industry, to the extent the Commission responds to *CenturyLink's Petition* by reversing its prior decision that over-the-top VoIP services are the functional equivalent of end office switching, such a ruling should only be applied prospectively from the effective date of such a ruling.

F. The Commission should confirm its policy against IXC exercise of self-help non-payment tactics in disputes with LECs over intercarrier compensation charges and impose penalties on IXCs that fail to comply.

For years, the Commission has condemned IXC self-help non-payment tactics in intercarrier compensation disputes, particularly when the IXC offers little or no substantive support for its dispute.

Back in the 1970s, the Commission instructed:

> [the] self-help approach is contrary to Section 203 of the Communications Act of 1934, as amended, and existing case law. Section 203(c) of the Act specifically forbids carriers from charging or collecting different compensation than specified in an effective tariff. Tariffs which are administratively valid operate to control the rights and liabilities between the parties. Rates published in such tariffs are rates imposed by law.[52]

[51] *Transformation Order* at ¶968.

[52] In re *MCI Telecommunication Corporation, American Telephone and Telegraph Company and the Pacific Telephone and Telegraph Company,* Memorandum Opinion and Order, FCC 76-685

This has been repeatedly confirmed. For example, the Commission has stated that "a customer, even a competitor, is not entitled to the self-help measure of withholding payment for tariffed services duly performed but should first pay, under protest, the amount allegedly due and then seek redress if such amount was not proper under the carrier's applicable tariffed charges and regulations.[53] In the *Transformation Order*, the Commission again condemned IXC self-help non-payment tactics:

> *Non-payment Dispute*s. Several parties have requested that the Commission address alleged self-help by long distance carriers who they claim are not paying invoices sent for interstate switched access services. As the Commission has previously stated, "[w]e do not endorse such withholding of payment outside the context of any applicable tariffed dispute resolution provisions." We otherwise decline to address this issue in this Order, but caution parties of their payment obligations under tariffs and contracts to which they are a party. The new rules we adopt in today's Order will provide clarity to all affected parties, which should reduce disputes and litigation surrounding access stimulation and revenue sharing agreements.[54]

Later in the *Order*, specifically with regard to disputes over intercarrier compensation for VoIP traffic, the Commission recognized the "disruptive nature of some providers' unilateral actions regarding VoIP intercarrier compensation, and [sought] to prevent such actions here going forward."[55]

Unfortunately, words of caution regarding IXC payment obligations and the clarifications provided in the *Transformation Order* were not sufficient to motivate IXCs to stop their unjustified unilateral withholding of access charge payments. The Joint CLECs' business

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(rel. July 30, 1976); *cf In re All American Telephone Co. v. AT&T Corp.,* Memorandum Opinion and Order 26, FCC Rcd 723, 728 (2011) (clarifying that self-help is not a per se violation of Section 203(c) of the Act but that "[w]e do not endorse such withholding of payment outside the context of any applicable tariffed dispute resolution provisions.")

[53] *In re Business WATS, Inc. v. AT&T Corp*., Memorandum Opinion and Order, DA 92-1613 (Comm.Carr.Bur. rel. Dec. 7, 1992)

[54] *Transformation Order* at ¶700 (citing *All American Telephone Co. v. AT&T Corp)*.

[55] *Id.* at ¶947.

operations continue to be severely disrupted by the IXCs' continued exercise of these improper self-help tactics.

Two federal courts recently recognized and enforced the Commission's policy against self-help non- payment. The most recent decision was in Peerless' case filed against Verizon for non-payment of access charges.[56] The court in the *Peerless* case described the issue as follows: "does Verizon have the right to unilaterally declare Peerless's Tariff unlawful and then withhold payments otherwise required to be made under the Tariff, without ever seeking an authoritative resolution of that issue through either an action filed in court or a complaint brought before the FCC, thereby transferring the litigation burden to Peerless, which is required by law to continue providing Verizon the services for which Verizon is refusing to pay?"

The *Peerless* court held that the answer to this question is no, Verizon does not have that right.[57] The court found that Verizon had a duty to raise a legal challenge to the Tariff, not simply decide on its own that the Tariff was invalid and refuse for years to make payments under it. [58]

The second decision enforcing the Commission's policy against self-help and cited by the *Peerless* court in support of its condemnation of Verizon's self-help, is a Fifth Circuit opinion in *Centurytel of Chatham, LLC v. Sprint Communs. Co., L.P.*[59] Like Verizon in the *Peerless* case, Sprint withheld payments to Centurytel for charges that were otherwise valid in order to reduce what Sprint unilaterally declared to be a retroactive refund claim. The lower court held that Sprint violated Section 201(b) of the Communications Act when it unjustly and unreasonably

[56] *Peerless v. MCI*, supra.
[57] *Peerless, slip copy* at pp. 16-17.
[58] *Peerless, slip copy* at pp. 15-16.
[59] 861 F.3d 566 (5th Cir. 2017).

withheld payments to reduce its retroactive refund claim.[60] Sprint challenged the lower court's decision on this issue, citing the Commission's decision in *All American Telephone Co. v. AT&T Corp*., 26 FCC Rcd 723, 727-729 (2011) which Sprint argued held that the "self-help" never constitutes a violation of the Communications Act.

The Fifth Circuit held that although withholding disputed amounts prospectively did not violate the Act, Sprint's "clawing back" retroactively disputed amounts it had already paid by deducting them from charges billed by Centurytel violated the Act, recognizing Commission precedent which made clear that self-help is not permissible.[61]

While these two recent court decisions have recognized and enforced the Commission's policy against self-help, other courts have not. The lack of uniform application of the Commission's policy coupled with the lack of an adequate enforcement mechanism against IXC self-help tactics have caused these disruptive self-help non-payment tactics to continue. As another LEC, Bandwidth recently stated in an ex parte filed in this proceeding with regard to the NPRM on access stimulation reform[62]: "Every act of IXC self-help costs Bandwidth time and money in disputed and unpaid access bills, diverting resources from running and growing its business. Rules that are not easy to apply and a lack of process for identifying access stimulators effectively reward the IXCs that engage in self-help, which encourages litigation."[63]

Like Bandwidth, the Joint CLECs have each been forced to divert hundreds of thousands of dollars and hundreds of personnel hours from running and growing their business to

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[60] *Id.* at 576.
[61] *Id.* at 577-578 ("Sprint took the extraordinary measure of acting on its own to recoup money it had already paid without any judicial or administrative intervention.").
[62] *Notice of Proposed Rulemaking Proposing Measures to Eliminate Access Arbitrage in the Intercarrier Compensation Regime*, WC Docket No.18-155 (rel. June 5, 2018).
[63] May 31, 2018 Notice of Ex Parte Communication, WC Docket No. 18-155; WC Docket No. 10-90; CC Docket No. 01-92, Tamar E. Finn, Morgan Lewis, Counsel for Bandwidth, Inc..

negotiation of billing disputes and litigation as a result of IXC unilateral self-help non-payment tactics. To remedy this disruptive practice, the Joint CLECs request that the Commission take the opportunity presented by the *CenturyLink Petition,* to confirm its policy against these IXC self-help non-payment tactics and hold that IXCs that violate the policy must pay a significant fine for doing so.

III. CONCLUSION

Accordingly, the Joint CLECs support CenturyLink's petition to the Commission to resolve ongoing uncertainty with respect to the application of switched access charges on traffic to or from an over-the-top VoIP end user by making clear that such charges apply when the LEC or its VoIP partner provides the unique functions of an end office switch, which are the functions of originating calls and monitoring calls for termination, and initiating call set-up and take down.

Additionally, the Joint CLECs ask if the Commission were to reverse its previous precedent on this issue and find now that over-the-top VoIP services are not the functional equivalent of end office switching, the Commission apply such new law prospectively only.

Finally, the Joint CLECs request that the Commission confirm its policy against disruptive IXC self-help tactics and hold that IXCs found to be engaging in such practices will be subject to penalties.

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